EMPLOYMENT TRIBUNALS

Claimant: **Dr H Korthals Altes**

Respondent: **University of Essex**

Heard at: **East London Hearing Centre**

On: **30th October 2020**

Before: **Employment Judge Reid**

Representation
Claimant: Mr Bain, Solicitor, Bower Bailey
Respondent: Mr Mordue, Solicitor, Eversheds Sutherland

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was partly CVP and partly audio (A) because the Respondent's representative was only able to join on the telephone, there being technical problems using CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

The terms of the Claimant's contract (including those incorporated provisions of the Respondent's Ordinances) allowed the Respondent to terminate the Claimant's contract prior to the end of her probationary period on grounds of unsatisfactory performance, without following the procedure for dismissal for good cause under Ordinance 41.

REASONS

<u>The preliminary issue for determination</u>

1. The preliminary issue for determination was identified in the Preliminary Hearing summary dated 14th May 2020 as 'Did the terms of the Claimant's contract (including those incorporated provisions of the Respondent's Ordinances) allow the Respondent to terminate the Claimant's contract prior to the end of her probationary period on grounds of unsatisfactory performance, without following

the procedure for dismissal for good cause under Ordinance 41?'

2. I was provided with a bundle of relevant documents paginated to page 117 plus a draft agreed facts/chronology. Both parties provided helpful detailed written submissions on the contractual analysis and authorities which were supplemented by oral submissions. The Claimant attended to listen to the submissions.

Contractual analysis

3. I set out at the end of this judgment my findings on the application of *Deman v Queen's University Belfast [1996] NI 379*. Whilst it is not binding on me and I have found that there are some areas in which it is factually different meaning it is of less assistance, I have taken into account, when construing the Claimant's terms, the matters identified by the Court of Appeal as relevant to the purpose of a probationary period – see paras 34- 35.

The Claimant's contract (statement of terms and conditions of employment dated 26th July 2017, page 32)

4. Clause 2 of the Claimant's contract (page 32) states that a permanent appointment is subject to satisfactory completion of a three year academic probationary period, unless otherwise agreed in writing. This is a condition subsequent. It provides that before successful probation is confirmed the lecturer is required to make an application to the Academic Staffing Committee (the ASC) prior to the end of the probation period. The clause is silent on the issue of an early end to the probation period before 3 years and on the initiation of the confirmation process by the Respondent, as opposed to by the Claimant. This clause does not give the Respondent the express right to terminate following a negative confirmation decision.

5. Clause 2 then goes on to make provision for particular senior appointments when the appointment is a permanent one without an academic probationary period (unless specifically provided for). From the outset therefore there is a distinction between those subject to a probationary period and those who may not be because they are appointed directly to 'permanent posts'. This concept of a *permanent* appointment as something different appears subsequently in Ordinance 39- see below – and in Ordinance 33.

6. Clause 13 (page 34) provides that the Respondent can give 3 calendar months' notice (or make a payment in lieu of notice). An exception is then given to that in cases of gross misconduct in which no notice is given but the procedures in Ordinance 41 will apply. That was not relevant to the Claimant because she was not dismissed for gross misconduct but the opportunity to also refer to a performance dismissal always requiring the Ordinance 41 procedure was not taken.

7. Clause 11 (page 34) provides that that the appointment is subject to the Ordinances including Ordinance 41 where applicable. The Ordinances are incorporated into the Claimant's contract.

8. Unlike Ordinance 41 the contract does not say what is to happen if there is any conflict between it and the Ordinances. This means that the conflict provisions in the Ordinances apply – see below.

9. The Claimant's appointment was subject to an express condition precedent as to satisfactory performance with a specific mechanism put in place to assess that by way of the probation agreement and the various stages in the probation process. Whilst accepting that the underlying issue is still performance (and the Respondent ran its capability procedure alongside the probation process in the case of the Claimant) a condition subsequent as to performance (with targets and a timescale, fixed as a condition of the employment) is a different animal to the termination of employment where performance turns out not to be satisfactory after employment starts and improvements are identified. Whilst they could be operated in parallel it does not follow that they both give rise to the same legal rights and consequences; the relatively long probation period (unusual in most employments) is a specific structure used for academics such as the Claimant and has a specific purpose, namely to allow for a longer than usual period of assessment after which the appointment is *confirmed* (when the condition is met). That is a different structure and mechanism to a capability dismissal initiated when performance is not going well, whether that other type of termination is effected under a non-contractual capability procedure or via contractual capability procedures.

The Ordinances

10. The Ordinances contain provisions regarding how employment can end for a performance issue. Ordinance 39 (page 38) covers the situation of how performance is assessed during or at the end of the probationary period by way of the confirmation process by the ASC. Ordinance 41 (page 40) covers terminations for redundancy and good cause as defined (including performance) involving a specific process including the appointment of a Tribunal (in the case of a performance dismissal) and the following of a specific contractual procedure. Each of these Ordinances therefore cover different factual situations and have deliberately been established separately.

11. Ordinance 39 and Ordinance 41 are drafted without reference to each other (save as set out in para 14 below, with the signposting of permanent staff moving beyond Ordinance 39); they appear to operate in almost separate silos. This is consistent with the different structure and purpose of the probationary period set out above and with the concept of permanency of appointment giving additional procedural protections in the event of dismissal (though as per clause 13 of the contract that extra protection is already in place for summary dismissals for gross misconduct whenever they take place).

Ordinance 39

12. Ordinance 39 applies to 'Academic Staff' as defined in Ordinance 34 (page 37). The Claimant falls within this definition. There is no distinction in this definition between those staff who are in their probationary period and those who have been confirmed in post after successful completion of the probationary period. However it cannot logically apply in Ordinance 39 to those who have successfully completed their probationary period and been confirmed in post and so from the outset the definition is not sacrosanct because its use must depend on the context and content of the Ordinance in which it is used.

13. Ordinance 39 (when read in conjunction with clause 2 of the contract) gives rise to the contractual right for the Claimant to have her appointment during or at the end of the probationary period assessed by the ASC. To short-circuit that and proceed directly to Ordinance 41 would give rise to a breach by the Respondent. Given that, the issue of duplication of procedures identified below arises.

14. Ordinance 39 para 3 (final sentence) provides for the Claimant's situation namely her appointment is subject to confirmation after a probationary period of 3 years, which if confirmed, leads to *permanency* of office (the permanency language used in clause 2 of the contract). Para 3 also uses the language of *confirmation* of appointment consistent with the existence of the condition subsequent. That confirmation language also appears in the Annual Review Procedures for Academic Staff (para 2.8, page 50). There is therefore a clear distinction between staff still subject to probationary terms and staff who, after they have had their probationary period confirmed, progress to having permanency of office. The references to the Ordinances as to termination (in brackets at the end of that paragraph) means that for those who become permanent staff their 'permanency' is expressly made subject to the termination provisions of the Ordinances. These are staff who have moved beyond the confirmation of probation stage and are no longer covered by Ordinance 39. This in effect acts as a signpost to the fact that these staff are now governed by a separate system – namely that their appointment, now permanent, is now subject to the termination provisions of the Ordinances which I construe to be referring to Ordinance 41. Once permanent, the lecturer has that new additional layer of protection. The change to permanent status goes both ways namely the lecturer has more security of tenure because the Ordinance 41 provisions apply but for the Respondent permanency does not mean there are no mechanisms to terminate. Staff who are permanent are therefore in a different category to those still in their probationary period and expressly move from Ordinance 39 to Ordinance 41. The express reference to that change militates against the Claimant's interpretation that Ordinance 41 must be followed in a termination during the probationary period.

15. The concept of permanency is also reflected in the Annual Review Procedures for Academic Staff and in the Probation – Guidance Notes (para 6.4 and 6.5, page 63 albeit referring to the application being by the individual).

16. Ordinance 39 para 4 gives the ASC the contractual right to make a decision on confirmation at any point prior to the end of the probationary period. The contractual effect of this as regards an early decision before 3 years is that the condition subsequent can in effect be brought forward by the Respondent to before the 3 year point (or likewise the lecturer can apply early). Like clause 2 of the contract, it is silent on the issue of the confirmation process being initiated by the Respondent (as opposed to by the Claimant). Despite the absence of an express power for the Respondent to initiate the ASC process, I find that the Respondent implicitly is entitled to do so after receipt of the probation Interim Report because to find otherwise would mean that even if there were serious problems, (not just of performance but also for example of serious misconduct) the ASC (the sole decision maker on confirmation) would be unable to make a decision about a lecturer and would have to wait for them to apply for confirmation, which clearly frustrates part of the point of the probationary period and undermines the very specific structure set up to ensure only those meeting high standards meet the condition of the appointment, whether that is assessed during or at the end of the period. I therefore do not accept that the Respondent was contractually unable to commence the process itself (C submission para 31) or that the ASC were bound not to consider it, just because it was not an application from the Claimant herself; that would go against the express right to make an earlier decision.

17. The inclusion of the express right to confirm or not confirm at any point ie not just at the end of the 3 years, means that there is no procedural or substantive difference between a negative confirmation decision made during the probationary period (as was the case for the Claimant) and one made at the end

of the 3 year period. The construction of the terms therefore applies in both situations.

18. Decisions on confirmation are made by the ASC (para 4). This is reflected in the Annual Review Procedure applicable to those on probation which states that *only* the ASC can make probation decisions (para 1.7, page 49) and para 8.1 of the Respondent's capability procedure (page 73) which refers to management of academic staff on probation via the ASC. Thus a different body to the Tribunal in Ordinance 41 is contractually the sole decision maker on confirmation during or at the end of the probationary period. That specificity of decision maker does not make Ordinance 39 in conflict with Ordinance 41's Tribunal process but demonstrates the different nature of its decisions. If the Respondent was *also* obliged, following the Claimant's negative confirmation decision, to terminate using the Ordinance 41 procedure, then this would have created an additional layer of procedure for which express wording in Ordinance 39 or 41 would have been required; it cannot be implicitly read in that the Respondent had to then go through another procedure before it could terminate, taking into account the analysis set out below of the survival of the general right to terminate in clause 13.

19. Further, the analysis proposed by the Claimant that Ordinance 41 applied once the ASC made its negative confirmation decision could lead to significant legal and practical problems because there would then be two decision -making bodies on the Claimant's performance; the ASC notwithstanding it is expressly designated as the sole decision maker on confirmation (a significant function, taking into account the rigour of the process, the length of the probationary period and it being an issue of considerable importance to the Respondent) , would have to then refer the same issue for the Tribunal to decide under Ordinance 41 who might disagree. That could result in stalemate in the process and frustrate the purpose of the ASC as the sole arbiter of performance in the probationary period. This cannot have been what was intended. There is also duplication in the 'investigation' stage of the process because the ASC would have completed its detailed analysis of whether or not the probation targets had been met and yet under Ordinance 41 the Vice Chancellor would have to do it again. As set out above, the Respondent could not alternatively just bypass the ASC.

20. That however does not stop the Respondent also running its capability procedures alongside the Probation Agreement and also setting up a Performance Improvement Plan (PIP) (in the Claimant's case the PIP dated 10th May 2018, page 93) but it expressly ran the two in tandem (opening para) and so was not restricting its rights to later proceed via the probationary/confirmation route.

21. Further, the capability procedure is not contractual and so any following of it by the Respondent was not because it was a contractual requirement. It could start or stop or adapt the process at any stage and rely on its contractual rights when it came to termination. The note at the top right of the flow chart on page 67 (procedure for non-Ordinance 41 employees) shortens the procedure for employees on probation. The express reference in this chart to employees on probation is consistent with the construction of the Claimant's terms being that there was no contractual obligation on the Respondent to follow the Ordinance 41 procedure in respect of the Claimant, because even applying the non-contractual capability policy to probationary staff generally required a lesser capability procedure.

22. Ordinance 39 does not expressly refer to decisions as to *termination* following non-confirmation. Unlike Ordinance 41 which sets out a detailed procedure,

Ordinance 39 is silent on the actual mechanism of termination. However that is consistent with the existence of the condition subsequent in that it follows from non-confirmation that the condition is not met and that the appointment is not therefore confirmed; in that scenario the Respondent can rely on the general right to terminate in clause 13 of the contract – see further analysis below. In that context I do not accept that the silence in Ordinance 39 as to actual termination (as opposed to confirmation) means that that vacuum has to be filled by Ordinance 41 – see further below as to the analysis of the conflict provisions of Ordinance 41 and the survival of clause 13 of the contract. This is not the same as saying that a negative decision by the ASC automatically triggered a dismissal (C submission para 32) because that could mean that a negative decision over a good candidate who has applied too early and does not yet meet the condition for confirmation would result in a termination, which cannot have been intended. In effect therefore it is a two stage process, the ASC decides whether or not to confirm and if the decision is that the candidate is unlikely to meet the condition even if more time is given (ie up to the 3 year point) then the Respondent can exercise the general right to terminate in the contract.

23. Ordinance 39 covers issues of performance and conduct when read in conjunction with the Annual Review Procedure, the Probation – Notes for Guidance and the Probation Agreement. It contains no terms about redundancy in a probationary period or an ill-health dismissal in a probationary period. Ordinance 41 by contrast covers a wider variety of situations though it also includes performance terminations – see below. Ordinance 39 and Ordinance 41 are therefore clearly not covering the same ground also for this reason.

Ordinance 41

24. Ordinance 41 applies to 'Academic Staff' in the same way as Ordinance 39 with no distinction between those in their probationary period and those who have become permanent. On the face of it therefore the Claimant also falls within Ordinance 41. However taking into account the separate contractual arrangements for probationary staff in Ordinance 39 I construe this definition in the different context of Ordinance 41 as excluding probationers (ie the reverse of how the definition has to work in Ordinance 39 as regards permanent staff – see above), taking into account the findings set out above as to separate provision for probationers in their own Ordinance (39), the significance of attaining permanency of appointment and the express reference within Ordinance 39 to permanency leading to protection of the termination provisions of the Ordinances. That there is a specific reference to Ordinance 41 and the gross misconduct situation in clause 13 of the contract is consistent with that analysis of the definition because it shows that the intention was that the Ordinance 41 procedure should apply in any event in that situation and therefore implicitly that it does not apply in any event in other situations, such as performance.

25. Ordinance 41 does not purport to apply in all termination situations. It only applies to redundancy and 'good cause' which includes misconduct (para 5(1)(a) and (b), performance (para (c)) and on medical grounds (para (d)). It does not make any express reference to employees in their probationary period but equally does not purport to apply in all situations – it is equally silent on for example dismissals where the employment could not legally be continued (for example if a foreign national ceases to have permission to work in the UK) or for those types of dismissals classed as 'some other substantial reason' type dismissals under the Employment Rights Act 1996 (for example re-organisations falling short of a redundancy situation or a personality clash). Because it does not cover all types of termination of employment or attempt to be a complete code, it cannot be construed as governing all circumstances of performance termination

because apparently falling within 'good cause' in para 5(1(c)). That construction would be inconsistent with the two separate processes to deal with performance during a probationary period – see above - and the signposting in Ordinance 39 of permanent staff to the termination provisions of the Ordinances which do not therefore apply until their appointment has been made permanent.

26. Whilst the Respondent could have expressly stated that the Ordinance 41 procedure did not apply to dismissals during the probationary period following non-confirmation by the ASC, there were already separate terms in Ordinance 39 for that situation taking into account the different confirmation process by the ASC, the structure involving a condition precedent and the concept of permanency. Ordinance 41 cannot therefore be interpreted as providing the contractual route to dismissal for a performance termination during a probationary period when looking at the Ordinances together. Although accepting the Claimant's argument that poor performance is poor performance and it is splitting hairs to say there is a different meaning in the probationary period as compared to the meaning (contained within 'good cause') in Ordinance 41, it does not follow that because the concepts are similar or the same that the Ordinance 41 procedure was the *contractual* route to termination for the Claimant at the stage of employment she was at.

27. Ordinance 42 para 3 (page 48) refers to an express right to terminate after the Ordinance 41 procedure is complete. This merely confirms the general right in the contract to dismiss on 3 months' notice and does not create any new rights. This term is however incorrect as regards a dismissal for gross misconduct without notice as para 3 is saying that 3 months' notice will be given for an Ordinance 41 dismissal but that could include serious conduct matters under paras (a) and (b) of the 'good cause' definition which might justify summary dismissal. It is not therefore possible to extrapolate from the absence of an express termination provision in Ordinance 39, that no such power existed, because where there is an express power for Ordinance 41 dismissals it does not cover every situation.

<u>The conflict provisions</u>

28. Ordinance 41 then attempts to deal with two situations (page 41). There are two distinct situations (a) a conflict between Ordinance 41 and other Ordinances and (b) the situation of where there is a term of the appointment/contract which also covers dismissal for good cause, in which case Ordinance 41 is said to override that if it could be construed as excluding or overriding Ordinance 41. It distinguishes between situations of conflict as between Ordinances (para 7(1)) and where there are good cause termination terms which should not be construed as overriding Ordinance 41 (para 7(2)). The drafting distinguishes between Ordinance conflicts and conflicts with appointment/contract terms and the two paragraphs are drafted separately and differently. I therefore construe 7(2) as applying in a different situation to 7(1) and not involving conflicts/clashes between Ordinances because para 7(1) has already dealt with Ordinance to Ordinance conflicts. This in turn means that the reference to any appointment/contract term concerning a good cause dismissal in para 7(2) does not cover terms arising from conflicts between the Ordinances themselves because that problem is already covered by para 7(1) and it must therefore cover contractual terms outside the Ordinances, in the Claimant's case her contract.

29. Para 7(1) provides that in any case of *conflict* with another Ordinance (in this case the relevant one being Ordinance 39) that Ordinance 41 shall apply. Taking into account the above findings, I find that there is not a *conflict* between Ordinance 39 and 41 because they set out different arrangements for two distinct

factual and legally different situations (ie the specific condition subsequent structure), with decisions being taken by different bodies. There is also no conflict because unlike Ordinance 41 which requires the specific Tribunal procedure before termination, Ordinance 39 does not mandate a particular termination procedure (or refer to dismissal at all) but is silent on the subject. The absence of such a procedure is consistent with the condition subsequent structure. Looking at para 7(1), Ordinance 39 therefore still applied to the Claimant as the contractual route to termination (ie following a negative confirmation decision made by the ASC) and, in turn, clause 13 of the contract gave the Respondent the general right to terminate on 3 months' notice without going down the Ordinance 41 procedure first. The analysis at this stage therefore goes back to where the analysis started, namely the general right to terminate under clause 13.

30. Turning finally to para 7(2), it provides that nothing in any appointment or contract shall be construed as overriding Ordinance 41 concerning the dismissal of a member of the Academic Staff. I do not find that para 7(2) operated as a general catch all meaning that the Ordinance 41 process was contractual during the probationary period.

31. This is because, even if the issue of who are Academic Staff for the purposes of Ordinance 41 (see above) is put on one side, the only term in the Claimant's contract which deals expressly with termination for cause (as defined in Ordinance 41) is clause 13 which refers to gross misconduct dismissals (and says anyway that Ordinance 41 *does* apply to that situation). There are no terms covering performance terminations which might be construed as overriding or excluding Ordinance 41 in the contract; Clause 2 of the contract does not say anything about the process for termination during or at the end of probation and in any event is a different animal – see above. There is nothing therefore in the Claimant's contract on which para 7(2) can bite because there is no term which could be construed as overriding or excluding the following of the procedure in Ordinance 41 in a performance dismissal. Para 7(2) therefore did not apply meaning that the Respondent could use the general right to terminate in clause 13 without going through the Ordinance 41 procedure first. The analysis therefore goes back to where the analysis started, namely the general right to terminate under clause 13.

Application of Deman v Queen's University Belfast [1996] NI 379

32. Both parties made submissions on the application of *Deman*. Both parties set out in detail why they said it did apply (the Respondent) or did not apply (the Claimant) – see para 3 Respondent's written submissions and both representatives made oral submissions on its application, it being argued for the Claimant that *Deman* did not assist the Respondent because the facts and relevant terms were different to the Claimant's and because ultimately what was in issue was construction of the Claimant's particular terms, on which *Deman* could not shed any light.

33. I distinguish the situation in *Deman* from the Claimant's for the following reasons:

- Mr Deman's claim was for judicial review of the decision to terminate his employment and not a claim for breach of contract
- The judgment does not do the type of contractual analysis of inter-related terms required in the case of the Claimant's terms and in any event Mr

Deman's terms were not the same as the Claimant's

- His terms referred to in para 3 of the judgment included in para (xii) express provision for the termination in the event the Board (the ASC equivalent) did not confirm the appointment; in the case of the Claimant Ordinance 39 was silent on the actual mechanism or procedure for termination after a negative confirmation decision and that silence was relevant to the application of the conflict provisions in Ordinance 41

- Mr Deman was arguing that the provisions of Chapter 20 (the Ordinance 41 equivalent) should have been followed *instead* of the probationary period procedure (headnotes para (i) and (ii)) because he claimed there was a difference between a recommendation for dismissal by the Board and a recommendation for dismissal by a Tribunal under Chapter 20; the Claimant was arguing that during her probationary period the Respondent was contractually obliged to go through the Ordinance 41 Tribunal procedure but was not saying it was instead of the ASC procedure.

34. An important similarity however was that Mr Deman fell within the definition of 'academic staff' and thus on a literal interpretation fell within Chapter 20 (page 15 of judgment penultimate paragraph). Notwithstanding that, the Court of Appeal held that, adopting a purposive construction, the power of the Board to terminate was not removed. Whilst the Claimant was not advancing the extent of that argument (because she was arguing that the Respondent could terminate following an ASC decision, it just had to go via the Ordinance 41 procedure first), the apparent inclusion of Mr Deman within the definition of those covered by Chapter 20 (academic staff) was not fatal to the University's case.

35. The *Deman* decision is however of assistance when considering the broader issues of the purpose of a probationary period for an academic which is in turn relevant to assessment of the nuts and bolts of the Claimant's contractual terms, as follows:

- The relevance of the existence of the condition subsequent as a particular feature

- The difference between dismissal of a probationer and dismissal of an established member of staff ('permanent' staff in the Claimant's situation) (page 16)

- The purpose of Chapter 20 being dealing with established members of staff (page 17)

- The massive inconvenience of the Board having to refer disciplinary matters to the Tribunal instead of the Board deciding them (page 17 Carswell LJ approved); in the Claimant's case the performance issues would have to be considered twice – once under the ASC confirmation process (because she was entitled to have that process applied to her) and then again under the Ordinance 41 Tribunal process

- The emasculation of the Board (page 18); although the Claimant's case was not put in the same way as Mr Deman's in that she did not go as far as say that Ordinance 41 should have been followed *instead* of the ASC confirmation procedure, there would still be some emasculation arising out of potentially a different view of the performance issues being taken by the

ASC on the one hand and the Tribunal on the other; this is because the ASC having made its decision based on an established, detailed and agreed way to assess performance against probation targets could find the Tribunal disagreeing with it thus undermining the standing of the ASC as the sole decision maker of probation confirmation and the purpose of the confirmation procedure.

Conclusion

36. Taking the above findings as to the construction of the Claimant's terms, the Respondent did not therefore breach the Claimant's contract when it terminated her employment prior to the end of her probationary period on grounds of unsatisfactory performance, without first following the Ordinance 41 procedure for a 'good cause' termination.

Employment Judge Reid
Date 10 November 2020